FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

January 16, 2004

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DONALD E. ARMSTRONG, Debtor.	BAP No. UT-03-002
DONALD E. ARMSTRONG, Appellant, v. RICHARD S. DEONATIVIA and BRYAN P. HILTON, Appellees.	Bankr. No. 00-26592 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the District of Utah

Before McFEELEY, Chief Judge, NUGENT, and McNIFF, Bankruptcy Judges.

McNiff, Bankruptcy Judge.

The debtor, Donald Erwin Armstrong (Armstrong), appeals the order of the United States Bankruptcy Court for the District of Utah denying his Emergency Ex Parte Motion (Ex Parte Motion) seeking damages against Richard S. DeOnativia and Bryan P. Hilton for alleged violations of the automatic stay and discharge injunction (Order).[1] Finding no abuse of discretion, we AFFIRM.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] On February 5, 2003, the Appellant, Donald E. Armstrong, filed a Request to be Exempt from Pagination Requirement, which was referred to this panel by Order dated February 20, 2003. The motion is granted.

Appellate Jurisdiction

The Bankruptcy Appellate Panel, with the consent of the parties, has jurisdiction to hear timely-filed appeals from final judgments, orders and decrees of bankruptcy courts within the circuit. 28 U.S.C. § 158(a)-(c)(1); Fed. R. Bankr. P. 8002(a). Because we construe the order as one of permissive abstention under 28 U.S.C. § 1334(c)(1), the order is an appealable order under the "collateral order" doctrine. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 768-69 (10th Cir. BAP 1997) (bankruptcy appellate panel not precluded from reviewing a decision to abstain under § 1334(c)).

Standard of Review

Orders of permissive abstention are matters within the sound discretion of the bankruptcy court and are reviewed under the abuse of discretion standard. *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 232 (2nd Cir. 2002); *The Ridge at Hiwan, Ltd. v. Thompson (In re Thompson*), 231 B.R. 802, 806 (D. Colo. 1999). Under the abuse of discretion standard, the appellate court will not disturb the trial court's decision unless it has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice. *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999) (abuse of discretion is "an arbitrary, capricious, whimsical, or manifestly unreasonable [judgment]").

Background

Armstrong is a pro se debtor who filed a voluntary Chapter 11 petition on March 20, 2000. Kenneth A. Rushton was appointed to serve as the Chapter 11 trustee in Armstrong's Chapter 11 case. On January 31, 2002, over Armstrong's objection, the bankruptcy court confirmed Rushton's Second Revised Plan of Reorganization (Confirmation Order). Armstrong was discharged under the confirmed Chapter 11 plan

pursuant to 11 U.S.C. § 1141(d)(1)(A).

Armstrong appealed the Confirmation Order to this Court, which dismissed the appeal as untimely on June 4, 2002. Armstrong appealed the dismissal to the Tenth Circuit Court of Appeals (Circuit Appeal). The Circuit Appeal is pending.

Before Armstrong filed his Chapter 11 case, he and Richard S. DeOnativia (DeOnativia) owned a parcel of real property located in Georgia. On October 26, 2001, between the time the Chapter 11 case was filed and the Confirmation Order was entered, DeOnativia filed a lawsuit against Armstrong in Cobb County, Georgia (Georgia Lawsuit). The Georgia Lawsuit states claims for damages arising out of the parties' co-ownership of the real property. Bryan P. Hilton (Hilton) is DeOnativia's attorney in the Georgia Lawsuit. Armstrong removed the Georgia Lawsuit to the United States District Court for the Northern District of Georgia, and the case is pending.

On May 21, 2002, Armstrong filed an adversary proceeding against DeOnativia and Hilton in the United States Bankruptcy Court for the District of Utah (Adversary Case). In the complaint, Armstrong stated claims for preliminary and permanent injunctions enjoining DeOnativia and Hilton from pursuing the Georgia Lawsuit as allegedly in violation of the automatic stay and the discharge injunction, claims for compensatory and punitive damages for those alleged violations, and claims arising out of the co-ownership of the rental property.

The same date, Armstrong filed a motion to withdraw the reference of the Adversary Case to the United States District Court, which he later withdrew. On August 9, 2002, Armstrong filed a second motion to withdraw the reference in the Adversary Case. The bankruptcy court transmitted the motion to withdraw the reference to the United States District Court for the District of Utah (District Court).

Although the District Court has not ruled on the motion to withdraw the reference, the Adversary Case is pending in the District Court. On November 26, 2002, Judge Tena Campbell entered an order staying the proceedings and enjoining

Armstrong from filing any motions in the adversary case pending the Circuit Appeal of the Confirmation Order. Judge Campbell also dismissed all pending motions without prejudice.

On December 13, 2002, less than a month after the District Court stayed the Adversary Case and enjoined Armstrong from filing motions, Armstrong filed the Ex Parte Motion and a Memorandum in Support in his Chapter 11 case. In the Ex Parte Motion and Memorandum, Armstrong alleges that DeOnativia and Hilton violated the automatic stay and the discharge injunction by pursuing the Georgia Lawsuit. Armstrong seeks compensatory and punitive damages for the alleged violations.

On December 20, 2002, the bankruptcy court entered the Order denying the Ex Parte Motion. The bankruptcy court did not articulate the legal basis for its decision, but found that the Ex Parte Motion was an attempt to avoid the stay imposed by the District Court. This timely appeal followed.

Discussion

In this appeal, Armstrong contends the bankruptcy court's Order should be reversed because it denies Armstrong his constitutional right of access to the courts and demonstrates the bankruptcy court's bias toward Armstrong. Those arguments are based principally on the Confirmation Order, not on the Order appealed here. Because we do not have the jurisdiction to consider any order other than the Order appealed from, we will only address the issues presented by this appeal: (1) whether the bankruptcy court had the jurisdiction to consider the Ex Parte Motion; and (2) whether the bankruptcy court erred when it abstained from deciding the Ex Parte Motion on the merits.

Bankruptcy Court Jurisdiction

DeOnativia and Hilton (collectively Appellees) challenge the jurisdiction of the bankruptcy court to rule on the Ex Parte Motion because the same issues are pending in the District Court. A bankruptcy court's jurisdiction is created and limited by 28

U.S.C. § 1334(b). That statute grants subject matter jurisdiction to the United States district courts over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." District courts may provide that "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). The United States District Court for the District of Utah has entered a general order of reference by local rule. D.U. Civ. R. 83-7.1.

While true that Armstrong's motion to withdraw the reference of the adversary proceeding was transmitted to the district court, Armstrong's Chapter 11 case remains in the bankruptcy court. The Ex Parte Motion was made in the Chapter 11 case.

Violations of the automatic stay are a core proceeding, and nothing in the code mandates that allegations of stay violations be brought in an adversary proceeding. Unless the reference is withdrawn, a bankruptcy court has subject matter jurisdiction over all core proceedings in the main case. 28 U.S.C. § 157(a), (b). Therefore, the bankruptcy court had the jurisdiction to consider the Ex Parte Motion.

Order Denying Ex Parte Motion

Next, we must consider whether the bankruptcy court's denial of the Ex Parte Motion was an abuse of the bankruptcy court's discretion. Permissive abstention arises under 28 U.S.C. § 1334(c)(1), which states: "[n]othing in this section prevents a district court in the interest of justice . . . from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."

The Ninth Circuit Court of Appeals summarized the factors to be considered when deciding whether to abstain under 28 U.S.C. § 1334(c)(1) in *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1167 (9th Cir.1990), *citing Republic Reader's Serv. Inc. v. Magazine Serv. Bureau Inc. (In re Republic Reader's Serv. Inc.)*, 81 B.R. 422 (Bankr. S. D. Tex. 1987). The relevant factors are: the presence of a related proceeding commenced in a

nonbankruptcy court; the substance of the "core" proceeding pending in the bankruptcy court; and the likelihood that the bankruptcy proceeding involves forum shopping. *Id*. at 429.

In this case, Armstrong filed the Ex Parte Motion immediately after the District Court entered its order staying the Adversary Case. The bankruptcy court reasonably concluded that Armstrong's purpose in filing the Ex Parte Motion was to avoid the District Court's order staying the proceedings and enjoining Armstrong from filing motions. Armstrong's conduct is a clear indication of forum shopping. Nor was it error for the bankruptcy court to conclude that when the same issues are pending in two courts with jurisdiction, the bankruptcy court may defer to the District Court for a decision on the merits.

Conclusion

Because we conclude the Order denying the Ex Parte Motion was a reasonable exercise of permissive abstention in the interest of justice, we AFFIRM.